IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1136 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDULHAFIZ ABDULKARIM SHAIKH - Appellant(s)
Versus
ADBULRASID RASUL MANSURI & 1 - Defendant(s)

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Appearance :
MR JA ADESHRA for Appellant(s) : 1,
NOTICE SERVED for Defendant(s) : 1,
MS MEGHA JANI for Defendant(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 12/02/2007

CAV JUDGMENT

Original claimant has approached this Court by filing this appeal to challenge the award made by the Special Motor Accident Claims Tribunal,

Panchmahals at Godhra dated 26th March, 1993 in M.A.C. Petition No. 65 of 1985. The Tribunal has partly allowed the claim petition of the appellant and has awarded Rs.15,000/- together with interest at the rate of 15% and proportionate costs. The appeal has been filed on the ground of inadequacy of the amount of compensation and to challenge the finding of the Tribunal regarding limited liability of the Insurance Company i.e., respondent no. 2.

2. The appellant sustained injuries in a vehicular accident which occurred on 24th June, 1984 around 2.00 p.m. At that time he was traveling in a auto rickshaw bearing Registration No. GRQ 250 owned and driven by respondent no. 1. He was coming from Moonlight Cinema to his residence in Godhra Town. According to the appellant, the rickshaw driver i.e., respondent no. 1 drove the vehicle in rash and negligent manner. As a result of the same, he lost control over the vehicle and it turned turtle. The appellant sustained bodily injuries. He was initially taken to the local Civil Hospital, but subsequently he was transferred to orthopedic hospital of Dr. AM Patel at Baroda. It is the say of the appellant that he had to remain in hospital for considerably long period since he had sustained compound fracture of his left femur shaft and he was also required to take follow up treatment after discharge from the hospital. It is his say that because of the injury, he had developed defect in walking and he was not able to carry on properly his work as scooter mechanic. It is his say that immediately after the accident for about 12 months

he could not work and earn income. He has stated he earned Rs.600/- p.m. On the basis of this, he preferred aforesaid petition claiming compensation of Rs.50,000/- from the respondents.

2.1. The respondents, in pursuance of the notices issued to them, appeared before the Tribunal. Respondent no. 1 did not file written statement. Respondent no. 2 filed the written statement at Exh. 9 and resisted the claim by denying the averments made in the petition. It also pleaded the defence of limited liability. According to it, by charging additional premium of Rs.90/-, it had covered the risk of three passengers only to the extent of Rs.15,000/- each. Both the sides led evidence to substantiate their respective cases. The Tribunal, at the end of the proceedings, partly allowed the claim holding that the liability of the Insurance Company was Rs.15,000/- per passenger and, therefore, the appellant was entitled to receive Rs.15,000/- by way of compensation. The appellant has, therefore, approached this Court by filing this appeal.

3. I have heard Mr. JA Adeshra, learned advocate for the appellant. He has submitted that the Tribunal committed grave error in holding that the liability of the Insurance Company was limited to Rs.15,000/- per passenger. It is his submission that under the policy, risk to the extent of Rs.50,000/- has been covered by the Insurance Company. He has further submitted that the Tribunal has not carried out any exercise to determine the just compensation

and it has proceeded on the footing that since the liability of respondent no. 2 is limited to Rs.15,000/-, the appellant is entitled to receive compensation of Rs.15,000/- only.

3.1. As against that, Ms. Megha Jani, learned advocate appearing for respondent no. 2 has submitted that the Tribunal has correctly interpreted the term of the policy and has rightly held that the liability of the Insurance Company is limited to the extent of Rs.15,000/-. She has submitted that the term regarding additional coverage given by respondent no. 2 is also to be read in the context and in consonance with the provisions of law. Lastly, she has submitted that if the liability of respondent no. 2 Insurance Company is limited, it cannot be directed to satisfy the award beyond the said limit and the claimant has a remedy to recover it from the owner. Respondent no. 1, though served, has not remained present.

4. The learned advocates have taken me through the record of the case. I have also carefully considered the rival submissions. So far the factum of accident is concerned, it is not disputed. It is also not in dispute that the appellant sustained injuries in the said accident. So far the aspect of negligence is concerned, the Tribunal has given a clear finding that the accident occurred solely due to the negligence of respondent no. 1. This finding has not been challenged by respondent no. 1 by filing any appeal or cross objections. I have

also perused the discussion on the point. It is proper. In view of the same, there is no need for me to reappreciate the evidence in detail on the issue of negligence.

4.1. So far the quantum of compensation is concerned, the submission of Mr. Adeshra is required to be accepted. In the entire judgment of the Tribunal, there is no indication that it made any exercise to assess just compensation on the basis of the medical evidence, evidence with regard to income, the disability suffered by the appellant, etc. It has mechanically held that since the liability of the Insurance Company is limited to Rs.15,000/-, the appellant is entitled to receive compensation to that extent only. This is totally a faulty approach. The Tribunal ought to have known that the appellant did have a remedy to recover compensation exceeding the limit of insurance from the owner of the vehicle. Since the Tribunal has not made any exercise on this count, I will have to scrutinize the material produced on record to assess just and legal compensation.

4.2. The medical certificate issued by the Civil Hospital, Godhra is at Exh. 31. It has recorded the following injuries :-

> "(1) A diffuse tender swelling on middle of Lt. Thigh c abnormal mobility c deformity c an oblique L.W. 8 cm x 3 cm x bone deep on its lateral side with fractured bone fragment. (comp. # lt. Femur) projecting

through wound,

(2) Abrasion, 3 cm x 2 cm on medial aspect of Lt. Ankle.

(3) Abrasion, 4 cm x 4 cm on front of Rt. Knee

(4) C.L.W. ½ cm x ¼ cm x skin deep on Lt. Frontal fubervsitu."

The appellant has also produced certificate regarding the treatment obtained at the Orthopedic Hospital of Dr. AM Patel, which is at Exh. 32. It shows that he had suffered compound fracture of shaft femur [left]. The certificate also shows that he was required to have leave of three months for treatment. Further the appellant has also produced the bills of the medicines purchased by him. His oral evidence is at Exh. 34. It shows that he was aged 26 years on the date of his deposition i.e., on 18th September, 1991. The accident took place on 24th June, 1984. Therefore, his age on the date of accident would be 19 years. The evidence further shows that he had remained as indoor patient for one and half months and iron rod was inserted during treatment, since there was fracture of the left shaft femur. For that purpose he was operated upon. Even after discharge from the hospital, he visited Doctor every fortnightly, for 15 times for follow up treatment. After one year the rod was removed and for that, second operation was performed. According to him, for medicines he had to spend about Rs.7,000/- to Rs.8,000/- and for special diet Rs.300/- to Rs.400/-. For transportation he had incurred expenditure of Rs.700/- approximately. Thus, it appears that the appellant had suffered considerable pain and inconvenience on account of the injury and had to spend substantial amount for

treatment. In view of the same, in my opinion, he is entitled to receive Rs.15,000/- for pain, shock and suffering and Rs.12,000/- to compensate the expenditure for medical treatment, transportation, special diet and attendant. It is in his evidence that his income was Rs.600/- p.m. His evidence shows that he had remained out of action atleast for three months. Hence, he is entitled to receive Rs.1,800/- under the head of actual loss of income. His evidence further shows that he has sustained permanent disability. It may be noted at this juncture that so far his entire evidence is concerned, it is not at all seriously challenged by the respondents. Hence, I proceed on the footing that what has been stated on oath by him is by and large true. He has stated that because of the injury and the consequential defect, he is not able to do the work of mechanic properly. Hence, he had taken up job in a private factory as a labourer and earned Rs.400/- p.m. Even if this say of the appellant is taken to be partly true and also the future increase is kept in view, the loss of earning capacity can be assessed at Rs.150/- p.m. i.e. Rs.1800/- per year. The age of the appellant was 19 years at the relevant time. Hence, multiplier of 16 can safely be applied. Therefore, he is entitled to receive Rs.28,800/- as future loss of income. Thus, the appellant is entitled to receive total sum of Rs.55,800/- by way of compensation.

5. The question is now with regard to the liability of respondent no. 2 to satisfy the award. The Tribunal has held that it is limited to the extent of

Rs.15,000/-. Mr. Adeshra has relied on the term of the policy which is in the form of endorsement no. 13 (b) attached to the Insurance Policy which is on record at Exh. 18. It reads as under :-

> "In consideration of an additional premium and notwithstanding anything to the contrary contained in section -II 1 (c) but subject otherwise to the terms, exceptions, conditions and limitation of this policy, the company will indemnify the insured against liability at law for compensation (including Law Costs of any claimant) for death of or bodily injury to any person other than a person excluded under section II – 1 (b) being carried in or upon or entering or mounting or alighting from the motor vehicle, but such indemnity is limited to the sum of Rs.15,000/- in respect of any one person and subject to the aforesaid limit in respect of any one person to Rs.50,000/- in respect of any number of claims in connection with the motor vehicle arising out of one cause."

According to Mr. Adeshra, the liability of insurance company is to the extent of Rs.50,000/-. Ms. Jani has, however, resisted this contention. She has drawn my attention to the affidavit filed by Mr. S. Venkatekrishnan, who has explained the clause regarding the liability undertaken by the Insurance Company. He has stated that for three passengers of the rickshaw, additional preimum of Rs.90/- is charged i.e., per passenger Rs.30/- covering the risk of Rs.15,000/- per passenger. So far the limit of Rs.50,000/- is concerned, it is in respect of persons other than the passengers. This clause of the policy clearly reflects that the liability is limited to Rs.15,000/- in respect of any one person and it is in respect of the passenger. It also says that subject to the individual liability for

any number of claim, the limit is Rs.50,000/-. This clause, therefore, is in accordance and in consonance with the provisions of section 95 (2) clause (b) (ii) (4). This provision prescribes the limit in respect of passengers and that is Rs.10,000/- for each individual passenger where vehicle is a motor car. Auto rickshaw falls in the category of motor car as defined in section 2 (15) of the Motor Vehicles Act. Thus, the submission of Mr. Adeshra cannot be accepted and the finding of the Tribunal on this count is required to be affirmed.

6. Lastly, in response to the query raised by the Court whether Insurance Company can be directed to pay the appellant at first instance and then to recover it from the insured, Ms. Jani has cited several decisions before me and has submitted that at one point of time the position of law with regard to passenger in a goods vehicle was not very clear and when the amounts were deposited by the insurance companies to satisfy the award, directions were given to the Tribunals to pay the amount to the claimants and the insurance companies were permitted to recover it from the insured, if the liability of the insurance company was found limited or not found at all. But now no such direction is given and the insurance company is not required to make payment to the claimant and then to recover from the owner.

6.1. She has placed reliance on the decision rendered by the Apex Court in the case of National Insurance Co. Ltd. v/s. Swaran Singh reported in

(2004) 3 S.C.C. p. 297, in particular, on para. 34 of the judgment wherein the Apex Court has referred to its earlier judgment rendered in the case of New India Assurance Co. Ltd. v. C.M. Jaya reported in (2002) 2 S.C.C. 278. Para. 34 is reproduced as under :-

> "34. However, we may notice that in C.M. Jaya case a Consittution Bench of this Court held that the liability of the insurer will have to be determined having regard to the question as to whether any extra premium is paid or not. It was observed : (SCC p. 285, para. 10)
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> > "The said decision cannot be read as laying down that even though the liability of the Insurance Company is limited to the statutory requirement, an unlimited or higher liability can be imposed on it. The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability, as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to rewriting the statute or the contract of insurance which is not permissible."

She has, therefore, submitted that in view of the aforesaid position of law, if the Insurance Company is directed to make payment to the claimant at first instance, even when the compensation which it is not either statutorily or

contractually liable to pay, it would amount to rewriting the statute. She has also placed reliance on the decision of the Apex Court in the case of National Insurance Co. Ltd. v/s. Premabhai Patel reported in (2005) 6 S.C.C. 172. In the said decision the Apex Court has held that the liability of the Insurance Company to satisfy the award was limited to the extent as provided under the Workmen's Compensation Act and the insured would be liable to satisfy the remaining portion of the award. She has, therefore, submitted that the Insurance Company is not asked to pay balance amount initially and to recover it from the insured subsequently. She has also placed reliance on the decision rendered by the Apex Court in the case of National Insurance Co. Ltd. v/s. Baljit Kaur reported in (2004) 2 S.C.C. p.1 in support of her contention that the direction with regard to initial payment to be made by the Insurance Company was being given since the position of law with regard to passenger in goods vehicle was not very clear. She has laid emphasis on the observations made by the Supreme Court in para. 21, which are as under :-

> "21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in Satpal Singh. The said decision has been overruled only in Asha Rani. We,

> therefore, are of the opinion that the interest of justice will be sub-served if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing Court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988, in terms whereof, it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding."

It may be seen here that so far the observation made by the Apex Court in the case of Swaran Singh [supra] while placing reliance on C M Jaya's case is concerned, it is only with regard to the position of law, namely that the Insurance Company cannot be asked to satisfy the entire liability of the insured when its liability is limited under the statute. However, this observation does not deal with the question with regard to initial payment by the Insurance Company and the subsequent recovery from the insured. The Apex Court itself has, therefore, even in judgments subsequent to this judgment, directed the Insurance Company to make payment to the claimant first and to recover the amount from the insured. The decision in the case of Swaran Singh [supra] was

delivered on 5th January, 2004, whereas in the case of Baljit Kaur [supra] it was delivered on 6th January, 2004 by the Bench comprising equal number of Judges i.e three. As can be seen in the case of Baljit Kaur, Apex Court has given such direction. In para. 13 of the decision rendered in the case of National Insurance Co. Ltd. v. Challa Bharathamma reported in (2004) 8 S.C.C. 517 the Apex Court has categorically observed as under :-

> "13. The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing Court shall take assistance of the concerned Regional Transport Authority. The executing court shall pass appropriate orders in accordance with the law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default, it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, i.e., the insured. In the instant case considering

> the quantum involved we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

This decision is dated 30th September, 2004. The Apex Court, while giving the direction, has kept in view that this is a beneficial object of the Act and, therefore, it was necessary and proper for the insurer to satisfy the award though in law it had no liability.

6.2. Ms. Jani has further relied on the decision of the Apex Court rendered in the case of National Insurance Co. Ltd. v/s. Bommithi Subbhatamma reported in (2005) 12 S.C.C. 243. She has referred to para. 11 of the said judgment that while holding that insurer was not liable, the Apex Court had made it clear that the claimants would be entitled to recover the amount of compensation granted in their favour by the Motor Vehicles Accidents Claims Tribunal from the owner of the vehicle. She has, therefore, submitted that in this case, no such direction has been given. Unlike the decision in Challa Bharathamma [supra] in this decision the Apex Court has not considered the question whether such direction can be given to the insurer. It has simply clarified that it would be open for the claimants to recover the amount from the owner.

6.3. In the case of Oriental Insurance Co. Ltd. v/s. Nanjappan reported

in AIR 2004 S.C. 1630, decided on 13th February, 2004, the Apex Court while relying on its decision rendered in the case Baljit Kaur [supra] has laid down as under :-

> "8. Therefore, while setting aside the judgment of the High Court we direct in terms of what has been stated in Baljit Kaur's case (supra) that the insurer shall pay the quantum of compensation fixed by the Tribunal, about which there was no dispute raised, to the respondents-claimants within three months from today. For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises, the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured. The appeal is disposed of in the aforesaid terms with no order as to costs."

In this case, the Apex Court has also prescribed the manner in which the Insurance Company can recover the amount from the insured.

6.4. The aforesaid decisions of the Apex Court clearly show that in its opinion, it would be proper for the insurer to satisfy the award even when in law it has no liability, considering the fact that this is a benevolent legislation. The Apex Court has at the same time, clarified that it will be open for the insurer to recover this amount from the owner of the offending vehicle. It has also prescribed the manner in which the amount can be recovered from the owner. It may also be kept in view that if the claimant is asked to recover this amount, even in the manner prescribed by the Apex Court, with limited means, the claimant will not be able to follow the remedy and in many cases it will be absolutely impossible for the claimant to trace the owner and recover the amount from him. As against that, the Insurance Company has all the resources at its disposal including the man power, it may not have to face the difficulty which a private individual may face in executing the award against the owner.

6.5. It may be noted here that in the case of Swaran Singh [supra] in para. 36 the Apex Court has observed as under :-

> "36. Sub-section (1) of Section 149 casts a liability upon the insurer to pay to the person entitled to the benefit of the decree "as if he were the judgment-debtor." Although the said liability is subject to the provision of this section, it prefaces with a nonobstante clause that the insurer may

> be entitled to avoid or cancel or may have avoided or cancelled the policy. Further more, the statute raises a legal fiction to the effect that the said purpose, the insurer would be deemed to be a judgment debtor in respect of the liability of the insurer."

Thus, by legal fiction, liability is cast upon the insurer to pay to the person entitled to the benefit of decree. However, even under section 149 of the Act the insurer is only required to pay sum not exceeding the sum assured payable under the policy. In aforesaid cited cases it was the insurance company which had preferred appeals, but in the present case the Tribunal itself has limited the liability of insurer to Rs.15,000/- and it has satisfied the liability to that extent only. Hence, in the facts of the present case, it is not possible to direct the insurer to pay first and recover the sum exceeding Rs.15,000/- from the insured.

In view of the aforesaid, this appeal is partly allowed. Since the claim of the appellant is Rs.50,000/- and in this appeal it is restricted to Rs.35,000/-, the appellant is entitled to recover compensation of Rs.35,000/- additionally i.e., over and above Rs.15,000/- already awarded by the Tribunal. However, the liability of respondent no. 2 to satisfy award is limited only to the extent of Rs.15,000/-. The appellant will be at liberty to recover the balance amount from the insured. The directions with regard to the costs and interest remain the same.

Registry is directed to retransmit the R & P to the concerned Court forthwith.

[Akshay H Mehta, J.]

* Pansala.